

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

FEDERICO VALENZUELA LEMMEN MEYER, ON HIS BEHALF AND AS SPECIAL
ADMINISTRATOR FOR FEDERICO VALENZUELA GONZALEZ; MARIA GABRIELA
LEMMEN MEYER VIUDA DE VALENZUELA; MARIA DEL MAR VALENZUELA
LEMMEN MEYER; MARIA GABRIELA VALENZUELA LEMMEN MEYER; DANIEL
VALENZUELA LEMMEN MEYER; AND MALEGA CIVIL COMPANY, A BELGIAN
ENTITY,
Plaintiffs/Appellants,

v.

D. MICHAEL MANDIG; WATERFALL, ECONOMIDIS, CALDWELL, HANSHAW &
VILLAMANA, P.C., AN ARIZONA PROFESSIONAL ENTITY CORPORATION,
Defendants/Appellees.

No. 2 CA-CV 2019-0030
Filed November 19, 2019

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20181217
The Honorable Leslie B. Miller, Judge

AFFIRMED

COUNSEL

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By David L. Abney
Counsel for Plaintiffs/Appellants

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Udall Law Firm LLP, Tucson
By Janet Linton
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Chief Judge Vásquez and Judge Eckerstrom concurred.

B R E A R C L I F F E, Judge:

¶1 Appellants Federico Valenzuela Lemmen Meyer, other members of the Lemmen Meyer family, and a Belgium company, of which the plaintiffs are the sole owners, (collectively “Meyer”) appeal from the judgment entered in January 2019, dismissing their second-amended complaint against appellees D. Michael Mandig, an attorney, and his law firm, Waterfall, Economidis, Caldwell, Hanshaw & Villamana P.C. (collectively “Mandig”). We affirm.

¶2 This appeal arises from litigation related to a legal dispute between Meyer and third parties in Mexico and a subsequent 2004 lawsuit Mandig filed on behalf of those third parties against Meyer in Pima County Superior Court (“2004 Case”). The 2004 Case was ultimately dismissed, the dismissal was upheld on appeal, *Corporativo Valenzuela Hermanos, S.A. de C.V. v. Gonzalez de Valenzuela*, No. 2 CA-CV 2018-0021, ¶ 30 (Ariz. App. Jun. 14, 2019) (mem. decision), and was, at the time of the proceedings below, the subject of a petition for review to the Arizona Supreme Court, *Corporativo Valenzuela Hermanos, S.A. de C.V. v. Gonzalez de Valenzuela* (2019) (No. CV-19-0196-PR).

¶3 Meyer’s second-amended complaint in this action asserted three claims against Mandig. Count I was entitled “Fraud Upon the Court” and claimed that Mandig’s actions “constituted an intentional fraud . . . directed at the Court itself and in fact deceived the Court.” Count II, for “Wrongful Institution of Civil Proceedings,” asserted that Mandig knew his clients did not have the legal authority to institute the 2004 Case but nonetheless continued and prolonged that litigation. Count III asserted that Mandig’s clients engaged in a fraud and that Mandig was aware of that

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fraud and “aided and abetted” the fraud by providing them “substantial assistance.”

¶4 In the motion to dismiss this complaint, Mandig argued first that Arizona does not recognize a private right of action for a claim of fraud upon a court. Second, he argued that Meyer’s claim of aiding and abetting fraud failed because, among other reasons, Meyer had failed to state the required elements of the underlying fraud, including reliance. And finally, as to Meyer’s claim for wrongful institution of civil proceedings, Mandig asserted that, among other infirmities, because the 2004 Case was the subject of a then-pending petition for review, it was not yet final, and thus could not yet be the subject of such a claim. After a hearing, the trial court granted the motion to dismiss in a detailed under-advisement ruling and subsequently entered a final judgment. This appeal followed, and we have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

¶5 As to his first two claims, Meyer argues that he was not required to plead the common-law elements of fraud to sustain a claim of aiding and abetting fraud and that this court should be the first to recognize a private right of action for fraud upon a court. As to his third claim, Meyer concedes that his wrongful institution of civil proceedings claim was properly dismissed as premature.¹ Meyer urges us to reverse the trial court and remand the matter for further proceedings on his first two claims.

¹The second-amended complaint was dismissed pursuant to Rule 12(b)(6), Ariz. R. Civ. P. A dismissal under Rule 12(b)(6) is an adjudication on the merits, unless the dismissal order states otherwise. Ariz. R. Civ. P. 41(b) (“Unless the dismissal order states otherwise, a dismissal under this Rule 41(b) *and any dismissal not under this rule*—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.”) (emphasis added); *Chaney Bldg. Co. v. City of Tucson*, 148 Ariz. 571, 573 (1986) (judgment on merits in prior suit involving same parties bars second suit based on same cause of action); *Gatecliff v. Great Republic Life Ins. Co.*, 154 Ariz. 502, 506 (App. 1987) (Rule 12(b)(6) dismissal disposes of merits and takes res judicata effect). The judgment of dismissal does not state that it is not on the merits, even as to the dismissal of the premature claim for wrongful institution of civil proceedings. Meyer did not assert below and does not argue on appeal, any error in the form of the judgment in this respect.

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¶6 As to Meyer’s claims that Mandig “aided and abetted” fraud upon the court, any claim of aiding and abetting the fraud of another requires proof of three elements: (1) commission of fraud by the primary tortfeasor that results in harm to the plaintiff; (2) defendant’s knowledge of the fraud; and (3) the defendant’s substantial assistance or encouragement of the primary tortfeasor. *Wells Fargo Bank, N.A. v. Ariz. Laborers, Teamsters & Cement Masons, Local No. 395 Pension Tr. Fund*, 201 Ariz. 474, ¶ 34 (2002). In any allegation of fraud, the pleading party is obliged to plead the fraud “with particularity,” which means, at a minimum, alleging the well-recognized nine elements of fraud. *See* Ariz. R. Civ. P. 9(b). That is, the plaintiff must plead the fact of:

(1) a representation, (2) its falsity, (3) its materiality, (4) the speaker’s knowledge of its falsity or ignorance of its truth, (5) the speaker’s intent that it be acted upon by the recipient in the manner reasonably contemplated, (6) the hearer’s ignorance of its falsity, (7) the hearer’s reliance on its truth, (8) the hearer’s right to rely on it, (9) the hearer’s consequent and proximate injury.

Comerica Bank v. Mahmoodi, 224 Ariz. 289, ¶ 14 (App. 2010).

¶7 Here, as the trial court recognized, not only did Meyer fail to plead reliance as an element of the fraud claim, he specifically disclaimed that appellants had relied on the purported misrepresentations of Mandig’s clients. Further, even assuming he had standing to do so, Meyer similarly failed to identify reliance by the court, justified or not, on any such representation. Given the failure to plead the required element of reliance, Meyer’s second-amended complaint asserting the claim of aiding and abetting fraud was, under the Rules of Civil Procedure, insufficient. Even so, there is no statutory or common-law basis for the underlying private right of action of fraud upon the court – certainly neither party has cited to one – and we do not accept Meyer’s invitation to recognize one in the first instance.

Disposition

¶8 We affirm the judgment and award appellees their costs on appeal upon their compliance with Rule 21, Ariz. R. Civ. App. P.